

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION**

DIANE OWENS, Individually and on Behalf of All Others Similarly Situated,)	No. 2:20-cv-03785-ALM-KAJ
)	
)	<u>CLASS ACTION</u>
Plaintiff,)	
)	Judge Algenon L. Marbley
vs.)	Magistrate Judge Kimberly A. Jolson
)	
FIRSTENERGY CORP., et al.,)	
)	
Defendants.)	
)	
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CHANA FRAND, Individually and on Behalf of All Others Similarly Situated,)	No. 2:20-cv-04287- ALM-KAJ
)	
)	<u>CLASS ACTION</u>
Plaintiff,)	
)	Judge Algenon L. Marbley
vs.)	Magistrate Judge Kimberly A. Jolson
)	
FIRSTENERGY CORP., et al.,)	
)	
Defendants.)	
)	
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**PROPOSED LEAD PLAINTIFF LOS ANGELES COUNTY EMPLOYEES RETIREMENT
ASSOCIATION’S OPPOSITION TO STATE TEACHERS RETIREMENT SYSTEM OF
OHIO’S MOTION FOR LEAVE TO FILE SUR-REPLY**

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The State Teachers Retirement System of Ohio's motion for leave to file a sur-reply just three business days before the hearing on the lead plaintiff motions should be denied. There are only two reasons why a party seeks leave to file a sur-reply: (1) because it genuinely needs to respond to a new argument raised for the first time in a reply brief; or (2) because it realizes it has lost on the merits but is nonetheless trying to sway the Court by attempting to have the final word. STRS' motion here falls in the latter category.

Indeed, STRS' opposition brief conceded that there is no legitimate basis for it to be appointed as Lead Plaintiff in this case; nonetheless, STRS invited the Court to appoint it as a Co-Lead Plaintiff. According to STRS' putative sur-reply, its bid to be named a Co-Lead Plaintiff is supported by its purported ability to provide "clear and effective advocacy for the Class and to the Court" in the form of a brief that is: (1) being presented six weeks after the initial lead plaintiff motions were filed (and on the eve of the hearing on those motions); and (2) seeking to introduce a novel argument benefitting another party, which neither it nor any other party advanced in any of the nine briefs already filed concerning the appointment of a lead plaintiff. ECF No. 60-1 at 4.¹ *See* ECF No. 60. To call such advocacy highly irregular would be an understatement.

Whatever the true impetus for STRS' last minute gambit, this Court's Local Rules prohibit "additional memoranda beyond those enumerated . . . except upon leave of court for good cause shown." S.D. Ohio Civ. R. 7.2(a)(2). And, "[w]hile the Court's Local Civil Rules do not define good cause, "this Court has consistently held that in order for a party to be given permission to file a sur-reply, the reply brief must raise new grounds that were not presented as part of the movant's

¹ Since the filing of lead plaintiff motions in this case, STRS has admittedly reached out to LACERA and its counsel to explore the possibility of STRS (and its counsel) joining with LACERA to prosecute this case. *See* ECF No. 44 at 2. LACERA believes that adding another decision-maker as lead plaintiff, as well as another law firm as lead counsel, would not be in the class's best interest. Consequently, LACERA declined STRS' entreaties. It was only after striking out with LACERA that STRS moved for leave to file the sur-reply.

initial motion.””” *De Angelis v. Nat’l Entm’t Grp. LLC*, 2019 WL 1024954, at *2 (S.D. Ohio Mar. 4, 2019) (Marbley, J.) (citations omitted). On this basis alone, STRS’ motion fails. *See* ECF No. 60-1 at 1 (“Because the matter was not raised by either CalPERS nor LACERA in their briefing . . .”). Moreover, had STRS truly wanted to assist the Court in its analysis of the financial interest inquiry, it could have (and should have) presented its argument – purportedly based on a **2005** Supreme Court decision – in its motion, opposition, or reply briefs. It did not.²

Ultimately, even if it were helpful (and STRS’ motion is not), as STRS’ own authority remarked, “the mere fact a sur-reply might be ‘helpful’ is not enough to justify its filing.” *NCMIC Ins. Co. v. Smith*, 375 F. Supp. 3d 831, 835-36 (S.D. Ohio 2019) (quoting *White v. Honda of America Mfg., Inc.*, 191 F. Supp. 2d 933, 944 (S.D. Ohio 2002)); *see also generally Jackson v. Old Dominion Freight Line*, 2018 WL 1521764, at *5 (S.D. Ohio Mar. 28, 2018) (Marbley, J.) (denying motion for leave to file sur-reply because the “Court, however, can ascertain on its own, by examining the evidence in the record, whether any of OD’s factual allegations are in fact misstatements or distortions of the record”). As the timing and nature of STRS’ motion confirm, the “sur-reply is neither necessary nor warranted to illuminate the factual issues any further.” *Jackson*, 2018 WL 1521764, at *5.

STRS has shown no good cause to permit its 39-page filing. Consequently, STRS’ belated motion should be denied. If the Court is nonetheless inclined to grant STRS’ motion for leave to file the sur-reply, LACERA will address STRS’ filing at the hearing.

DATED: November 13, 2020

Respectfully submitted,

MURRAY MURPHY MOUL + BASIL LLP

s/ Joseph F. Murray

² As STRS acknowledges, the financial interest test they now ask the Court to adopt is predicated on its interpretation of *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005), which addressed the standard for pleading loss causation in PSLRA cases. *See* ECF No. 60 at 1.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on November 13, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

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